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POLICE DUTIES OF COMMON CARRIERS.

For the reason that the carrier owes to the passenger the exercise of the utmost diligence for his comfort and safety, while the relation of carrier and passenger subsists, the former has the authority to institute and execute proper police regulations for the protection of the latter. The subordination of the passenger to reasonable regulations of this character is a reciprocal duty. The violation of such regulations by a passenger justifies his summary expulsion from the carrier's vehicle or premises,[1] or forcible separation from the other passengers.[2] The authority of the carrier in this respect is correlative with his duty. In a case heretofore reported in the columns of this JOURNAL,[3] this matter is well considered by Chalmers, J., who concludes as follows: "Powers and duties are usually reciprocal, and may be said to be uniformly so when the power is of a public, official character, conferred for the benefit of others. The failure or refusal of the official to exercise such a power in a proper case when called upon by those for whose protection he has been invested with it, amounts to negligence, or to wilful misconduct, as the circumstances of the case may indicate, * * * a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and, upon the maxim *respondeat superior*, renders the corporation liable."

Of course, a considerable degree of caution is necessary in the execution of this power. The carrier will be responsible for the act of his servant in expelling a passenger from his vehicle, under a mistake of facts or of judgment as to the misconduct of the latter.[4] Upon familiar principles no more force can be used than is adequate for the purpose of expulsion.[5] Thus, in Seymour v. Greenwood,[6] the Court of Exchequer Chamber held that the carrier was responsible for an injury caused by the needlessly violent expulsion from an omnibus of a person who was drunk, had refused to pay his fare, and had assaulted the guard. The time, place and circumstances, also the condition of the passenger, will be elements for the jury in deciding whether the expulsion was effected in a reasonable manner, so as not to inflict wanton or unnecessary injury upon the offending passenger, nor needlessly to place him in circumstances of peril, at the time of and after his expulsion.[7]

If the conduct of the passenger is such as to excite reasonable apprehensions that his presence will result in injury or annoyance to other passengers, it is the right and duty of the conductor to expel him, without waiting for any overt act of violence.[8] Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocations, may be excluded therefrom. But if a ticket has been sold to such a person and the company desiring to rescind the contract for transportation, prevents him from getting on board, it should at the same time tender the return of the money paid for the ticket.[9] In the case just noticed, the plaintiff was prevented from entering the train. Said Dundy, J.: "Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled." It is not perceived why according to the principles of Vinton v. Middlesex Railroad Company, gamblers, pickpockets, sneak thieves, and persons whose notoriously vicious character renders it extremely probable that their presence will result in the robbery or swindling of other passengers may not be excluded even

(1) Vinton v. Middlesex R. Co. 11 Allen, 304; Chicago etc. R. Co. v. Griffin, 68 Ill. 499; Pittsburgh etc. R. Co. v. Van Houten, 48 Ind. 90; Pittsburgh etc. R. Co. v. Valleley, 32 Ohio St. 345, 6 Cent. L. J. 277, 7 Reporter, 406.

(2) Marquette v. Chicago etc. R. Co. 33 Iowa, 562; Chicago etc. R. Co. v. Williams, 55 Ill. 185, 188.

(3) New Orleans etc. R. Co. v. Burke, 4 Cent. L. J. 539, *s. c.* 53 Miss. 200.

(4) Higgins v. Watervliet Turnpike Co. 46 N. Y. 23.

(5) State v. Ross, 26 N. J. L. 224; Murphy v Middlesex etc. R. Co. 118 Mass. 228.

(6) 7 Hurl. & N. 355; affirming, *s. c.* 6 Hurl. & N. 359.

(7) Pittsburg etc. R. Co. v. Valleley, 32 Ohio St. 345; *s. c.* 6 Cent. L. J. 277, 7 Reporter, 406; Murphy v. Middlesex etc. R. Co. 118 Mass. 228; Marquette v. Chicago etc. R. Co. 33 Iowa, 562.

(8) Vinton v. Middlesex R. Co. 11 Allen, 304.

(9) Thurston v. Union etc. R. Co. 4 Dill. 321.

(10) *Supra*.

after they have taken passage upon the train, and before they have begun to ply their vocation. The ruling in the Massachusetts case was made with reference to an intoxicated passenger, but why should it not apply to the cases indicated? The circumstance that large numbers of the traveling public are defenceless persons, and that their property while on the journey is quite insecure, would seem to be a sufficient reason for vesting the carrier's servants with the power and duty of summarily expelling such notorious law-breakers at any time from a railroad train, steamboat, horse-car or other public conveyance. "The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers if he was admitted into a public vehicle or allowed longer to remain within it."[11] If the probability of mere discomfort or annoyance is a sufficient reason for the expulsion of an obnoxious passenger, *a fortiori* that of robbery ought to be.

The foregoing observations are prompted by the fact that text-writers do not seem to have visited with proper condemnation the *nisi prius* talk of Rolfe, B., in an obscure case, to the effect that though certain passengers were known to be pickpockets, that might be a reason for watching them, but *per se* did not justify putting them off.[12] It can not be seriously contended, for example, that it is the duty of the conductor of a railroad train to detail a squad of brakemen from the control of the train to watch a gang of known pickpockets, or of the railroad company to supply every train with a private police force for this purpose.[13] Such ought not to be, and is not, the duty of carriers or their agents. Therefore, if the language of Rolfe, B., is the law, passengers are without adequate protection against persons known to be dangerous, who have boarded a public conveyance for the express purpose of robbery or swindling.[14]

The master of a ship has been held responsible for losses incurred by a passenger at the hands of a pair of gamblers and tricksters, which it was in his power to have prevented, because he was aware of the character of one of the swindlers, the fleecing was done in the presence of the clerk of the boat, and the master was informed of the circumstance in season to have compelled the pair to disgorge.[15] This is well. But if a carrier is to be visited with responsibility in such cases, he should certainly be clothed with all reasonable powers to prevent the occurrence. It should be his right and duty at any time, whether before, during or after the commission of a crime, to expel the offender upon reasonable grounds of suspicion. The safe conduct guaranteed to law-abiding passengers demands it, and, in general, rogues only would suffer from the exercise of this power of expulsion.

The use of profane and indecent language in a railway coach, in the presence of ladies, is such a breach of decorum as will afford just cause for the removal of the passenger from the train, although he was provoked to such expressions by the demand of the conductor for fare which had already been paid.[16] If a person, having purchased a ticket, attempts to get on board a car, disgustingly drunk, or so drunk as to be likely to violate the common proprieties and decencies of life, he has no right to passage while in that condition;[17] but slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated, would not be sufficient ground to refuse him passage, although his behavior might not be in all respects strictly becoming.[18]

As before stated, the duty of protection

(11) Bigelow, C. J., in Vinton v. Middlesex R. Co. *supra*.

(12) Coppin v. Braithwaite, 8 Jurist, 875; See Angell on Carriers, § 532; Hutchinson on Carriers, § 545; 1 Redfield on Railways (5th Ed.) 111, note 10. This case was cited by Davis, J., in the opinion of the court in Pearson v. Duane, 4 Wall. 605, 615, but the facts of that case in no respect resemble these under discussion as the passenger was not a dangerous person.

(13) Pittsburgh etc. R. Co. v. Hinds, 53 Pa. St. 412, 516, *per* Woodward, C. J.

(14) Weeks v. New York, etc. R. Co. 72 N. Y. 50; *s. c.* 16 Am. L. Reg. (N. S.) 506; 6 Rep. 54.

(15) Smith v. Wilson (U. S. Dist. Court for the Southern District of Alabama, Busteed, J.) 31 How. Pr. 272.

(16) Chicago etc. R. Co. v. Griffin, 68 Ill. 499; see also People v. Caryl, 3 Park. Cr. Cas. 326.

(17) Murphy v. Union R. Co. 118 Mass. 228; Vinton v. Middlesex R. Co. 11 Allen, 304; State v. Ross, 26 N. J. 224; Pittsburgh etc. R. Co. v. Vandyne, 57 Ind. 576; Hendricks v. Sixth Ave. R. Co. 12 Jones & Sp. 8.

(18) Putnam v. Broadway etc. R. Co. 55 N. Y. 108, 114; Pittsburgh etc. R. Co. v. Vandyne, *supra*.

which the carrier owes to the passenger includes a responsibility for the unlawful acts of fellow passengers, when by the exercise of the highest degree of care those acts might have been foreseen and prevented.[19] As stated by Shipman, J., in Flint v. Norwich Transportation Company,[20] carriers are "bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatsoever source arising, which might reasonably be anticipated or naturally expected to occur, in view of all the circumstances and of the number and character of the persons on board." Therefore in a case in which the plaintiff was injured by the accidental discharge of a gun which fell from the hands of a soldier, engaged in a scuffle, who was one of a large body of soldiers who had embarked upon the defendant's boat—many of them drunk and disorderly, though in charge of their officers and a guard—he left it to the jury to say whether the officers of the boat were properly vigilant in attempting to quell the disorder or inform the passengers of the character of the men, and the danger of coming in contact with them.[21] Although it is not the duty of a railroad company to furnish a standing police force adequate to the resistance of mobs of disorderly persons who may board its trains, yet it is the duty of the conductor of the train to make all possible resistance against such disorderly persons, by calling together for this purpose all the trainmen and passengers willing to lend a helping hand to this end.[22] Whether the carrier has provided a sufficient number of officers for the protection of its passengers is a question for the jury.[23] The conductor of a railroad train does not perform his duty on the occasion of a violent disturbance among a large body of drunken passengers, by coming to the car door and counselling the sober passengers to throw the riotors from the car,[24] nor by simply hurrying an assaulted passenger from one car to another, making no effort to remove from the train the persons guilty of the assault, or prevent their further violence.[25] If the assault upon the passenger is so sudden that it can not be prevented, and the conduct of the person making the assault has previously not been such that his action might reasonably have been anticipated, the carrier will not be responsible for the consequences.[26] Thus, an intoxicated passenger having insulted two females who were in the company of the plaintiff's intestate, was ordered by the conductor of the street car in which they were riding, to take a seat and be quiet, which he did. After the conductor returned to the rear platform of the car, the passenger resumed his abuse and threatened the plaintiff's intestate with violence. None of this last conversation was said in a tone sufficiently loud for the conductor to hear, nor was there any evidence that it came to his knowledge. The passenger then went upon the front platform and remained there quietly until the plaintiff's intestate left the car and was assisting his companions to alight, when the passenger in question came around from the front platform and assaulted him with a car-hook, inflicting blows upon his head from the effects of which he died. The Court of Appeals held that in this case a motion for a nonsuit should have been granted. Said Allen, J., delivering the opinion of the court: "The fact that an individual may have drank to excess, will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion.[27] * * * * If there was anything in the condition, conduct, appearance or manner of Foster [the assailant], from which the jury could reasonably

(19) Pittsburgh etc. R. Co. v. Hinds, 53 Pa. St. 512; Putnam v. Broadway etc. R. Co. 55 N. Y. 108; Flint v. Norwich etc. Trans. Co. 34 Conn. 554; *s. c.*; 6 Blatch. 158; Pittsburgh etc. R. Co. v. Pillow, 76 Pa. St. 510; New Orleans etc. R. Co. v. Burke, 53 Miss; 200; *s. c.* 4 Cent. L. J. 539; Holly v. Atlanta St. R. Co. (Sup. Ct. Ga.) 7 Reporter, 460; Sherley v. Billings, 8 Bush, 147; Goddard v. Grand Trunk R. Co. 57 Me. 202 213, *per* Walton, J.; Hendricks v. Sixth Ave. R. Co. 12 Jones & Sp. 8.

(20) *Supra.*

(21) Flint v. Norwich Trans. Co., *supra.*

(22) Pittsburgh etc. R. Co. v. Hinds, 53 Pa. St. 512.

(23) Holly v. Atlanta St. R. Co. (Sup. Ct. Ga.) 7 Reporter 460.

(24) Pittsburgh etc. R. Co. v. Hinds, *supra.*

(25) New Orleans etc. R. Co. v. Burke, 53 Miss. 200; *s. c.* 4 Cent. L. J. 539.

(26) Putnam v. Broadway etc. R. Co. 55 N. Y. 108.

(27) Ibid. 114.

infer that there was reason to expect or anticipate an attack upon the deceased, or any other passenger, either while upon the car, or in the act of leaving, the facts authorizing such inference should have been proved, and the knowledge of them brought home to the conductor."[28]

Although the circumstances of an assault upon a passenger may be such that the company will be liable for injuries sustained by the passenger, yet this liability does not cover every species of damage. Thus, the car in which the plaintiff was a passenger was left standing alone in the city of New York without any of the company's servants upon it. The plaintiff while leaving the car was violently assaulted and robbed of a large quantity of bonds by three persons whose presence upon the car were unknown to the defendant's servants, though it might have been known but for their negligence. In an action for the value of the securities thus taken from the passenger, the court held that the defendant owed no such duty to the plaintiff, that it was an insurer of the safe carriage of his securities in the mode of carriage adopted by him.[29] But where the police regulations of a steamboat are so lax that time and opportunity is given a thief, without detection, to enter a stateroom of the ladies cabin, which was properly fastened, and steal therefrom a portion of the plaintiff's baggage, the proprietors of the boat were held responsible for the loss.[30]

THE TWELFTH AND THIRTEENTH VOLUMES OF THE AMERICAN DECISIONS.

With the twelfth volume of this series Mr. Freeman, as the successor of the late Mr. Proffatt, commenced his labors. It is gratifying to notice that the change has not affected the character of the work; at least we have not been able to find anything to demonstrate that these volumes are not fully as well edited as their predecessors. In one particular, indeed, they appear to be better, viz; in the proportion of cases annotated. The twelfth volume contains lengthy notes on the following topics: *Mandamus* to restore officers; words actionable, *per se*; purchases by trustees; powers of executors; statements of jurors to impeach verdicts; set-off; power to punish for contempt; dissolution of corporations; variance in actions for slander; vendor's lien; malicious prosecution; judicial acts on Sunday, to which is added, though somewhat out of its order, a statement of the laws regarding Sunday contracts; wagers; amendments of judgments; statutes of limitation; revocation of wills; recovery of money paid on illegal contracts; conflict of laws in transfer of personalty; *certiorari*; patents for land; tender; writ of prohibition; liability of bailees; actions between partners; and negotiable paper made by agents. In the thirteenth volume the most valuable notes are on the subjects of blank indorsement of negotiable paper; estoppel of tenant; liability of owner of hired vessel; indorsement of notes by partner; avoidance of infant's contracts; judgments against infants; amendment of process; adverse possession; variance between execution and judgment; *idem sonans*; effect of absence on limitation; *res adjudicata*; lost notes and bonds; stay laws; liability of corporations for torts; appurtenances; filling blanks in written instruments, and set-off of mutual judgments. Mr. Freeman's annotations we may look for to be always appropriate and reliable, if his first two volumes are to be taken as an earnest of the future, as we judge they may be. There is, however, another matter which we think it proper to mention at this time. We observe that the twelfth volume contains fourteen and the thirteenth fifteen volumes of reports. Mr. Proffatt's last two volumes contained but eight and ten volumes respectively. As this undertaking progresses the number of reports comprised in one volume should be proportionately less, for there are fewer obsolete cases; and the late opinions are generally more lengthly than the early ones. Does the thirteenth volume, for example, contain "all the cases of general value and authority" in fifteen volumes of reports? Are there only twelve cases in 1 Mo. and fifteen in 1 Ohio, which are entitled to be re-reported? We do not undertake to answer these questions either one way or the other, though at some future day we may examine a future volume in the light of these inquiries. We simply wish to call the attention of the editor to the fact that the value of this series will be lost and its chief end unattained if the object of giving "*all* the cases of general value and authority" should ever be sacrificed to the desire to complete it within a certain time, or in a particular number of volumes.

In the twelfth volume we notice the following interesting cases. *Clark v. People*, Breese, 340, holds that the power to punish for contempt is inherent in the court, and is in its discretion, and not reviewable; the remedy if used maliciously or oppressively is by indictment or impeachment of the judge or magistrate. In *Hardin v. Cumstock*, 2 A. K. Marsh, 480, it is held that words uttered in the regular course of justice, however defamatory, are not actionable. In *Coburn v. Harwood*, Minor 93, it was held that words charging the crime against nature were not actionable

(28) Ibid. 118. See, also, New Orleans etc. R. Co. v. Burke, 53 Miss. 200, 225.

(29) Weeks v. New York etc. R. Co. 72 N. Y. 50, s. c. 17 Am. L. Reg. N. S. 506, 6 Reporter 54.

(30) Walsh v. The H. M. Wright, Newb. (Admr.) 494. But see Abbott v. Bradstreet, 55 Me. 530,

The American Decisions, containing all the cases of general value and authority in the courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and annotated by A. C. Freeman. Vols. 12, 13. San Francisco: A. L. Bancroft & Co. 1879.

per se, in Alabama, that crime not being indictable by the common law, or by any statute of the State. The decisions as to what words are actionable in themselves without proof of special damage are many and conflicting, and have, as remarked by the annotator of this case, given courts and text-writers much difficulty in laying down a general and at the same time accurate rule by which to determine what words orally published are actionable *per se*. Mr. Townshend (Slander and Libel, § 153, 179, 196), thus classifies them: 1. Those which charge an indictable offense involving moral turpitude. 2. Those which charge the being afflicted with certain diseases. 3. Those which affect one in his office, occupation or business, or in some special character. But it is rather singular to find that while the offense of removing land marks has been held to involve moral turpitude (Todd v. Rough, 1 S. & R. 18), the same is not true of taking away standing corn (Stitzell v. Reynolds, 59 Pa. St. 488); that bribing electors (Hoag v. Hatch, 23 Conn. 585); attempting to corrupt jurors (Gibbs v. Dewey, 5 Cow. 503,) and selling liquor to a slave (Smith v. Smith, 2 Sneed, 473), have been held to be within the term, while trading with slaves (Heath v. Devaughn, 37 Ala. 677); wife-beating (Dudley v. Horn, 21 Ala. 379); and breaking open and reading a letter sent by the mail (Hillhouse v. Peck, 2 Stew & P. 395), have not. A *mandamus* will not lie on behalf of one claiming the office of judge of a county court, directing another who holds the commission and is exercising its duties to admit the petitioner to that office. *State v. Dunn*, Minor, 46. A decree can not be amended at a subsequent term. *Bramlet v. Pickett*, 2 A. K. Marsh, 10. The repeal of a statute giving jurisdiction to a court deprives it of the right to pronounce judgment in a proceeding previously pending. *Todd v. Landry*, 5 Mart. 459. In *Reeves v. Booth*, 2 Mill, 384, a party claiming under a will which could not be found was held entitled to introduce evidence of declarations of the testator that he had made a will. *Mortmain v. Lefaux*, 6 Mart. 654, discusses the rights of an "editor." The plaintiff sued for compensation for services in editing a newspaper called *Le Moniteur*. He produced a written contract under which he was given the management of the paper during the absence of the defendant, or for the space of one year, and entitling him to one-half the profits of the concern. Before the end of the term the defendant insisted on the publication of a composition of his own in favor of monarchical power, in consequence of which and because of the plaintiff's belief that to admit such a piece to the columns of the paper would injure it, he withdrew from the defendant's office and refused any longer to edit the paper. The court held that he could not recover, putting their decision upon the principle that where a party contracts to serve another for a specified period he can not recover anything for serving a less period, Matthews, J., saying: "Having by an express stipulation the care and direction of the manner in which the *Moniteur* should be conducted during all the time of the absence of the proprietor, or for the term of one year, whilst that period continued he was master of the press, and had as much right to refuse the publication of any improper piece offered by the defendant as of those presented by any other person. He ought to have maintained his situation and standing as editor, and persisted in the fulfillment of his duties under the contract."

In the thirteenth volume we note the following: In *Bank of United States v. Sill*, 5 Conn. 106, the plaintiff's agent in Ohio desiring to remit to him a bank bill, for greater security cut it in two, sending one-half by mail on one day and the other half two days after. The first letter reached him but the second never came to hand. The plaintiff subsequently presented the moiety of the bill for payment, which the bank refused except on the production of both parts—the board of directors having previously given public notice in the newspapers that the bank would not pay any of its bills which were voluntarily cut in two unless both parts were presented. The court held that the plaintiff could recover, the other part of the bill not being negotiable, Peter, J., referring to an old English case (Mayor v. Johnson, 3 Camp. 324) in these words: "In that case judgment was rendered for the defendant by Lord Ellenborough, on the ground that the lost half of a bank bill was negotiable and would enable a *bona fide* holder to recover of the bank which, with all due deference to the illustrious judge, I am bound to say is not law. As well might a vignette or any other fragment torn from a bill be considered negotiable. The only apology I can make for his lordship is that he was on the circuit where business is done in haste without time and means for investigation and consideration, and where the greatest judges frequently err; *Quandoque bonus dormitat Homerus*." Regarding the notice given by the board of directors, the court say: "This is as extraordinary as it is novel; and is probably the first instance of a debtor undertaking to prescribe terms to his creditors." In *Bliss v. Commonwealth*, 2 Littell, 90, the defendant was indicted for carrying a sword cane in violation of an act of the legislature, "to prevent persons from wearing concealed arms." He was convicted in the court below and fined $100, but in the Court of Appeals the judgment was reversed, on the ground that the act was in conflict with the Kentucky Constitution providing that "the right of the citizens to bear arms in defense of themselves and the State shall not be questioned." The court in deciding the case said:

"That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defense of themselves and the State, will not be controverted by the court; for though the citizens are forbid wearing weapons, concealed in the manner described in the act, they may, nevertheless, bear arms in any other admissible form. But to be in conflict with the Constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the right to bear arms in defense of the citizens and the State that is secured by the Constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by

the explicit language of the Constitution. If, therefore, the act in question imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms, or any other, the consequence, in reference to the Constitution, is precisely the same, and its collision with that instrument equally obvious. And can there be entertained a reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right existed at the adoption of the Constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear them when the Constitution was adopted. In truth, the right of the citizens to bear arms has been as directly assailed by the provisions of the act as though they were forbid carrying guns on their shoulders, swords in scabbards, or when in conflict with an enemy were not allowed the use of bayonets; and if the act be consistent with the Constitution, it can not be compatible with that instrument, for the legislature, by successive enactments, to entirely cut off the exercise of the right of the citizen to bear arms. For, in principle, there is no difference between a law prohibiting the wearing of concealed arms, and a law forbidding the wearing of such as are exposed; and if the former be unconstitutional, the latter must be so likewise."

The Constitution of Kentucky was subsequently amended in this section by the addition of the clause "but the general assembly may pass laws to prevent persons from carrying concealed arms," and under this the courts of that State have since enforced acts prohibiting the carrying of concealed weapons. Among the other cases in this volume, which we had marked for an extended notice, but which the space at our disposal prevents, are *Gaillard v. Anceline*, 10 Mart. 479, holding that a former public officer has no authority to certify proceedings had before him while in office; *Nugent v. Roland*, 12 Mart. 659, which rules that a promissory note, stating the sum in figures, is valid; *Bridgewater Academy v. Gilbert*, 2 Pick. 579, where it was decided that an action on a subscription paper will not lie to recover the amount of a subscription to rebuild an academy, there being no other act on the part of the subscriber to encourage the rebuilding; *Ferguson v. Miller*, 1 Cow. 243, which holds that a subsequent licensee has priority over a prior one who has not taken possession; *Youngblood v. Lowry*, 2 McCord, 39, where a horse sent to a livery stable to be fed and cared for was held not subject to distress for rent, and *Orr v. Bank of the United States*, 1 Ohio 36, in which the obsolete doctrine is maintained that an action for assault and battery will not lie against a corporation.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN.

BRAINARD v. ELWOOD.

Supreme Court of Iowa, December, 1879.

The lien of an attorney on money due his client attaches to a judgment entered therefor, and can not be defeated by the creditor consenting to have the judgment set aside.

Appeal from Jones District Court:

This appeal is taken from the order of the court overruling a motion made by defendant, to set aside the judgment rendered in the case.

Sheean & McCarn, for appellant; *W. J. Chamberlain*, for appellees.

ADAMS, J., delivered the opinion of the court.

The judgment in question, for $2,004, was rendered June 1, 1878. On the third day of June the attorneys who obtained the judgment for the plaintiffs filed liens thereon for their services in the case. There was evidence also tending to show that certain creditors of the plaintiffs acquired an interest in the judgment. In October, 1878, the plaintiffs and defendant entered into a stipulation that the judgment should be set aside. At the next December term of the court the motion in question was made, being based on the stipulation.

In the view which we take of the case it will be sufficient to consider whether the court was justified in overruling the motion by reason of the attorney's liens filed upon the judgment. In our opinion it was. Code, § 245, provides that an attorney's lien may be made effective against the judgment debtor by giving notice of the lien in the judgment docket. When this is done it appears to us that the attorney acquires an interest in the judgment, and by proper proceedings may have a decree against the judgment debtor and judgment creditor for the enforcement of so much of the judgment as shall enable him to collect what is due him. It is true that it is not specifically provided that the attorney shall have a lien upon the judgment; but where a lien is given upon money due by a judgment, it appears to us that there is a resulting right to enforce the lien through the judgment. Where a person has a lien upon the promissory note secured by mortgage or otherwise, he has without doubt the benefit of the security. The security is an incident to the debt, and must redound to the benefit of any person who becomes entitled to collect the debt. If, then, in the case at bar, the attorneys acquired an interest in the judgment, it was not within the power of the judgment creditor to divest it, either by discharging the judgment or by consenting that it might be set aside.

It is true a case may arise where the judgment ought to be set aside, and that, too, without the expense of an appeal. From this it is argued that parties should be free to deal with the judgment in their own way. But if such a case should arise

the parties can find a short road to freedom, either by paying the attorney or by releasing the lien under the statute. Code, § 216. It may be that if the defendant had moved to set aside so much of the judgment as was not covered by the lien, the motion should have been sustained; but no such question is before us. The principal object of the plaintiffs, in consenting that the judgment might be set aside, may have been to defeat their attorneys. If so they doubtless preferred that the motion should be overruled altogether than sustained as to that part of the judgment not covered by the attorney's lien.

In our opinion there was no error in overruling the motion. Affirmed.

SEEVERS, J., dissenting.

Being unable to concur in the foregoing opinion, I desire to briefly state the grounds of my dissent. An attorney has a lien on "money due his client in the hands of the adverse party." To effectuate the lien the attorney must serve a notice on the adverse party, stating "the amount claimed, and in general terms for what services." If, however, a judgment has been recovered by the client, such notice is deemed sufficiently served by entering the same "in the judgment docket opposite the judgment." Code, § 215. It is clear the lien is on the money in the hands of the adverse party, and not on the judgment. A judgment is evidence of indebtedness; but it may be set aside by a new trial, or reversed on appeal. When this is done it no longer exists as evidence of indebtedness. Now I think the parties, in the absence of fraud, may by stipulation set aside the judgment, and thus save the expense of an appeal, in which, in their judgment, there must be a reversal.

REMOVAL OF CAUSES.

GREENE v. KLINGLER.

United States Circuit Court, Western District of Texas, October 13, 1879.

1. Under the statutes of Texas, when the tenants call in the landlord or real owner, and he makes himself a party, being thus the real defendant he has the right, under the act of Congress of March 3, 1875, if he be a citizen of a State other than that of the plaintiff, to remove the cause to the proper United States court on complying with the law, the controversy being regarded as one wholly between him and the plaintiff.

2. And such application is in time if made on the day after he becomes a defendant, though this be not the first term to which the suit was brought, provided the cause had not been previously at issue or ready for trial.

3. The application of the landlord to be made a party defendant, and his subsequent application to remove the cause to the United States Circuit Court, being both made in open court in the State court, and both being resisted and passed upon by the State court, and made the subject of bills of exceptions by the plaintiff, the matters raised by such application and passed upon by the State court and reserved by the plaintiff can not be inquired into in the Federal court upon a mere motion to remand the cause, based alone upon the matters contained in the transcript sent from the State court.

Motion to remand.

John Ireland, for the motion; *Hancock, West & North, contra.*

DUVAL, J.

The above entitled and numbered causes were removed from the District Court of Comal County, State of Texas, and filed in this court on the 16th day of June, 1878. They are ordinary actions of trespass to try title commenced on the 21st day of June, 1878. On the 18th of September, 1878, they were continued as upon the affidavits of defendants. On the 19th of September the defendant answered, setting up a general demurrer, the plea of not guilty, the statute of limitations of three and five years, and adverse possession in good faith for more than one year with valuable improvements, etc.

On the 21st of January, 1879, the defendants filed their motion to require M. C. Hamilton to defend the case as their landlord, and on the same day M. C. Hamilton himself moved for leave to appear in said cause, as landlord of defendants, and defend the same. This was resisted by the plaintiff, but after hearing the argument the court on the 22d day of January, 1879, allowed M. C. Hamilton to become a party defendant as landlord, and he thereupon entered his appearance as landlord of defendants, pleading the general issue and adopting as his own the pleading of said defendants. On the same day M. C. Hamilton filed his petition alleging himself to be a citizen of the State of New York, and praying to remove the cause into the Circuit Court of the United States for the Western District of Texas, holden at the city of Austin, at the same time offering the necessary bond, etc. This motion to remove was also resisted by the plaintiff but it was allowed by the court and an order to that effect made on the 23d of January, 1879. To the action of the State court allowing Hamilton to become a party as landlord, and to remove the case into this court, the plaintiff duly filed bills of exceptions, etc. These are the material facts as shown by the transcripts of the record filed in this court.

The plaintiff now moves this court to remand these cases to the District Court of Comal County on two grounds—1st. Because, as he alleges, there is no act of Congress of the United States, giving to this court jurisdiction over said causes; and 2nd. because the motion to remove to this court came too late. I presume that this application for removal was made on the part of Hamilton under the second section of the act of Congress of March 3d, 1875, entitled "An act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes." This section provides, among other things, that, "any suit of a civil nature at law or in equity," involving over $500 in which there shall be a controversy between citizens of different States may be removed from a State court to the proper Circuit Court of the United States by either party. As respecting the time in which the removal must be applied for, the provision is that the petition therefor must be filed in the State court, "before or at the term at

which the cause could be first tried, and before the trial thereof." It seems to me that under the Texas statute providing a mode of trying title to land, there can be no doubt that Hamilton, as the landlord of the tenant had the right to come in and defend the suit. The fifth section of the statute referred to provides that, "when a tenant is sued for the lands of which he is in possessson, the real owner, or his agent or attorney, may enter himself on the proceedings as the defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action." Under this provision Hamilton had the absolute right, as landlord of the tenant sued, to make himself the defendant, and having done so, he became virtually the sole defendant, and entitled to make any defense that he could have done had he been the original defendant. The controversy then became one wholly between himself and the plaintiff. The tenants who had been sued were thereafter merely nominal parties; they became, in fact, dormant parties, whose appearance or existence was no longer necessary in the further progress of the litigation. Under these circumstances, it seems to me that the mere fact of their being citizens of the State of Texas ought not to defeat the right of Hamilton to a removal. Whether Hamilton was, in fact, the landlord of the defendants originally sued, is not shown by the transcript of the record, and can not be inquired into or determined upon this motion to remand.

And the action of the District Court of Comal County on this subject can not be revised by this court. It is not denied that Hamilton is a citizen of the State of New York, and such, at present, must be regarded as his status. It is well established by repeated decisions of the Supreme Court of the United States that in controversies respecting real property in a State, the laws of such State and decisions of her highest court are rules of decision for this court. Construing, therefore, the Texas statute which gives to landlords the absolute and unqualified right to make themselves parties defendant in actions of trespass to try title in connection with the act of Congress of March 3d, 1875, my conclusion is that these cases have been properly removed, and this court has jurisdiction over them as being a controversy between citizens of different States, provided it was removed in proper time.

The transcript of the record shows that at the first term of the Comal District Court, after the institution of the suit, viz., on the 18th of September, 1878, it was continued on an affidavit of defendants, and on the same day, during the same term, the defendants filed their answer. The case was, therefore, not at issue until after the continuance was entered, and under the laws and practice of the State of Texas was not subject to be tried upon its merits until the next succeeding term thereafter, that was the term at which Hamilton moved for the removal, and I think he was in time, even so far as the case could be first tried as between the plaintiffs and original defendants. Be this as it may, when Hamilton entered his appearance as landlord, and moved for the removal of the case, it was certainly the first term at which the cause could be tried as to him. He made the motion for removal on the next day after he was made the party defendant, and it was allowed by the State court. This was the earliest moment at which he could have made the application, and the law can not be properly construed to require any greater diligence on his part.

In my opinion the court has jurisdiction over these cases, so far as appears upon this motion and the transcript of the record. The motion to remove is therefore overruled.

ACTION FOR DAMAGES FOR CAUSING DEATH—WHEN SUSTAINABLE — MEASOF DAMAGES.

BURKE v. CORK, ETC., R. CO.

Irish High Court, Exchequer Division, June, 1879.

In an action under Lord Campbell's Act (9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95), in which the plaintiff claimed damages for the death of his son B, caused by injuries sustained through the defendants' negligence, it appeared that B, at the date of his death, was aged fourteen years and two months, and had been for about three years attending school, where he was especially trained for mercantile pursuits, and where it was expected he would have remained for a couple of years more; but during his three vacations (one month, one week, and three weeks) the plaintiff used to send him to his second shop to look after the shop assistants, and to assist the plaintiff generally in his business, which was that of a spirit grocer and general merchant, and the plaintiff being also manager of a post and telegraph office, B was sometimes employed in riding out with telegrams; and the plaintiff also stated that he himself was frequently absent from home, and that his son, who was very good and dutiful, was useful at plaintiff's farm. B was not in receipt of any wages, but he was intended for the mercantile business of the plaintiff, and though then too young he would have been fit to be put into the shop had he lived till seventeen, at which age, in the plaintiff's opinion, his services would have been worth to plaintiff £20 a year, which would have increased to £100 at the age of twenty. The plaintiff (aged fifty) admitted that he "turned" about £7,000 per annum on his business, and that his income was sufficient. *Held*, that there was no evidence of damage to the plaintiff within the statute, proper to be submitted to the jury, and that judgment should be entered for the defendants.

In this action the statement of claim alleged that the plaintiff, Richard Burke, was the father of Denis Burke, the deceased, who, in his lifetime, on the 8th of September, 1878, became and was received by the defendants to be by them carried as a passenger on a railway from Cork to Kilcrea, and on the return journey, for reward to the defendants. While on the return journey, between Ballincollig and Cork stations, on the defendants' line of railway, the train in which Denis Burke was traveling was thrown off the line of railway by reason of the negligent, careless and improper manner in which the line of railway was kept and managed by the defendants and their servants.

The carriage in which Denis Burke was, was broken, and he received such injuries that he died thereof on the 23d of September, 1878. The plaintiff, as the father of Denis Burke, who died intestate and unmarried, for the benefit of all the parties entitled according to the statutes (Lord Campbell's Act, and the act amending same), claimed £3,000 damages. The defendants by their statement of defence denied that the plaintiff, or any of the persons on whose behalf the action was brought, had sustained any loss, damage, or injury resulting from the death of the deceased Denis Burke, within the meaning of the statutes 9 & 10 Vict. cap. 93, and 27 & 28 Vict. cap. 95.

At the trial, which took place at the Cork Spring Assizes, 1879, before Fitzgerald, J., and a special jury, the following evidence was given: Brother John Slattery, of the North Monastery, deposed that Denis Burke, who was a strong and healthy boy, had been attending his (witness') school for about three years, and he (witness) would have expected him to remain a couple of years more at the school. His attainments were above the average, and he was very assiduous in his application. He was especially trained in that department of knowledge which fitted him for mercantile pursuits; he wrote well and neatly; and he was attentive to the work he was expected to perform at home. He attended school regularly. There were three vacations—one month in summer, one week at Easter, and about three weeks at Christmas. The plaintiff, residing near Cork, deposed as follows: He was a spirit grocer and general merchant, and had also the local post and telegraph office. The deceased, who was born on July 15, 1864, used to stay in Cork at the house of Mr. Hayes, for the purpose of attending school. He was a good, dutiful child, and during his vacations was sent into witness's second shop to look after the assistants, and to assist generally in the business. He did not make entries in the books. He was not paid any wages, but he was very useful when he was at home. Witness was frequently absent from home, and the deceased was useful at the farm. He was sometimes employed in sending out telegrams; if a telegram came he would ride off on the pony with it. He was not taught the use of the telegraph instrument. He was intended for witness's business. He was too young for the business, but if he lived until seventeen he would have been fit to put into the shop, and his services would then have been worth £20 a year to witness, increasing year by year, and at the age of twenty would have been worth £100 a year. He was never at home except in vacation, and was kept out and given as much amusement as possible, but witness "did not believe in keeping idle." Witness carried on his business all the year round without him. He (witness) was 50 years old; he "turned" about £7,000 per annum on his business, and made an income he could live on, and expected to be able to provide for his family.

At the close of the plaintiff's case, counsel on behalf of the defendants applied for a direction on the ground that there was no evidence of pecuniary loss within the meaning of the statute. This application was refused by the learned judge; but he reserved liberty for the defendants to move for judgment in case he should have complied with their requisition. The learned judge reported that in charging the jury his instruction to them was, in substance, that their verdict—if for the plaintiff—could rest only on the pecuniary loss he had sustained from the death of his son, and that if there was no such pecuniary loss, their verdict should be for the defendants. He further told them that in estimating the amount of the plaintiff's pecuniary loss, if any, they might take into account the pecuniary advantages, if any, which the plaintiff might reasonably have expected to derive from his son's services up to the period of his attaining maturity, should he so long have continued to be an inmate of the plaintiff's house. He took care to guard the jury against any unreasonable estimate, or any undue finding for the plaintiff, by reminding them of the great uncertainty which beset such an expectation, and the contingencies to which it was subject; and, also, of the expenses which the plaintiff would necessarily have incurred before such expectation, however reasonable and well founded, could have been brought to realization. The jury found for the plaintiff £150 damages; and the learned judge stated in his report that if there was evidence proper for the consideration of the jury, it seemed to him that the verdict was not against the weight of evidence, nor was it excessive if his instructions were correct. The defendants obtained a conditional order for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence, against making which absolute cause was now shown; the defendants, also, moving for judgment.

Heron, *Q. C.* (with him, *Peter O'Brien* and *Shinkwin*), for the plaintiff. The defendants admit negligence, and the plaintiff's son manifestly would have been entitled to recover damages if death had not ensued. In this action, within the meaning of Lord Campbell's Act (9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95), the measure of damages is to be estimated by any reasonable expectation of the pecuniary advantage the plaintiff would have derived from his son had he lived. Franklin v. South Eastern R. Co., 3 H. & N. 211; Dalton v. South Eastern R. Co. 4 C. B. N. S. 296; Pym v. Great Northern R. Co. 4 B. & S. 396; Bramwell v. Lees, 29 L. T. (O. S.) 82, 111, 166. We submit that the verdict was right, because the jury were warranted in coming to the conclusion that there was a reasonable probability of benefit and profit to be derived by the plaintiff from the services of the deceased if he had not been killed. Condon v. Great Southern R. Co. 16 I. C. L. R. 415.

James Murphy, *Q. C.*, and *W. O'Brien*, *Q. C.* (with them, *Ronan*), for the defendants. The contingency of future benefit can not arise from the mere relation of father and son; therefore, no action lies for the death of a son as such. Here the plaintiff's son was only a boy of fourteen, not

in any way benefiting his father in a pecuniary sense, nor did it appear at the trial that there was a reasonable expectation of future profit. It may reasonably be inferred that a boy now alive will eventually earn a livelihood, but it is a wholly different thing for whose benefit he earns it. and here it has not been shown that the plaintiff might probably participate in that benefit. The poverty of the plaintiff in Condon's case distinguishes it from the present.

P. O'Brien, in reply.—It is not an unreasonable expectation that a son, situated as deceased was, would assist his father and become a profit to him. It is not necessary to look to benefits already conferred. Blake v. Midland R. Co. 18 Q. B. 93. Suppose the case of a boy being killed a month before he was to come into the possession of an estate—would not the parents be taken to have sustained damage in respect of the loss of such estate? The question of reasonable expectation is peculiarly within the province of the jury. In Bradburn v. Great Western R. Co. L. R. 10 Ex. 1; Bramwell, B., says: "The statute had laid down no rule as to the mode of calculating the damages to be given in respect of the right of action which it created. The rule was first laid in this court, and that rule was, that the damages were to be compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life."

PALLES, C. B.

The principles of law applicable to the assessment of damages in an action such as the present are quite clear. Such damages must be given in reference solely to pecuniary loss, but that pecuniary loss may be evidenced by proof of a reasonable expectation of pecuniary benefit from the continuance of the life. To prove, however, a reasonable expectation of pecuniary benefit there must be evidence from which a jury may be able to arrive, otherwise than by guess or speculation, at the conclusion that there was in effect such reasonable expectation; and this involves two matters—first, a reasonable expectation that profit would be made by the continuance of the life; second, a reasonable expectation that some part of the profit so made would become the property of the person on whose behalf damages are claimed. No doubt, it is not necessary that the part of the profit in question should become the property of the claimant as a matter of right; reasonable expectation of bounty would be sufficient. Now, in the present case, there was, in my opinion, evidence from which a jury might reasonably infer that the continuance of the life of the boy would have been a source of profit to himself; but I am unable to arrive at the conclusion that there was reasonable evidence which would enable a jury to say that there was reasonable expectation that he would have been a source of profit to his father. Bridges v. Northern etc. R. Co. L. R. 7. H. L. 213, decides that in determining the preliminary question, whether there is evidence to go to the jury in support of any particular proposition, we must take notice of, and to a certain extent act upon, the ordinary experiences of human life. Acting upon this experience, my view is that this boy would have been more likely a source of expense than of profit to his father. But, be this as it may, it is clear that up to the moment of the unfortunate occurrence in which he met his death, he had never contributed one sixpence to the support of the family. It is equally clear that the position of the father is such as to put him far beyond the necessity of resorting, for his support or otherwise, to the earnings of his child. The case is one in which there was no moral duty on the part of the child to contribute any portion of his earnings to the parent or the family. Now, bearing in mind that the burthen lies upon the plaintiff of establishing, by a preponderance of proof, that there was a reasonable expectation that profit would result to him from the continuance of the life of the child, can it be said that such preponderance exists in the present case, or that it is anything more than a matter of speculation? I am not aware of any case in which a parent recovered damages when he or she had not been actually benefited by the labor of the child. Many of the cases cited establish that if there be this actual benefit, the jury are not limited in the amount of damages to the benefit which actually was conferred, but may estimate the value of similar benefits which might have been conferred during the continuance of the life. But I am aware of no case in which, where no benefits had been conferred, a verdict for the plaintiff was sustained. Where benefits have been conferred, and the life of the person conferring them has been cut short, there may reasonably be a presumption that such a course of conduct might have been persevered in, the thing, the value of which is to be estimated, being a thing proved as a fact to have been subsisting, but of which the duration was uncertain. But, in the present case there is no element of certainty. If the state of things existing at the time of the death is to be presumed to continue, you presume a continuance of expense to the parent, and a continuance of the absence of benefit from the child. You first, therefore, as a foundation of damages, must presume that the course of life and conduct of the child is to change, and that, when his labor becomes valuable, the profit of that labor is to become the property of the father. But can it be said that this is anything more than speculation? Upon how many circumstances must it depend? Upon the dispositions of the child—how are they to be proved? The dispositions of the father—how are we to determine whether the father would allow himself to become the beneficiary of his child? The circumstances of the father? In the present case these are such as to rebut the inference that the child would be a source of profit. These considerations might be extended to an indefinite length. The more the matter is considered, the more, in my mind, it will be found that in the present case we have not any sufficient elements to enable a jury to say that it is reason-

ably certain that pecuniary benefit would have resulted to the father from the continuance of the life of the child. The case ought to have been withdrawn from the jury.

DOWSE, B.

I agree with my lord chief baron, that there was no evidence proper to be submitted to the jury in this case. I am inclined to go further than he has done, and to hold that, in a case of this description, the plaintiff must fail unless he establishes by evidence that there was in existence, at the time of the death of his son, a state of facts in connection with him out of which a pecuniary advantage arose or had formerly arisen, and was likely to again arise to the father, and a continuance or renewal of which pecuniary advantage the father might have reasonably expected had his son not been killed. There is no doubt, as Willis, J., said in Dalton v. South-eastern R. Co., *supra*, that "the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account by the jury, and that damages may be given in respect of that expectation being disappointed, and the possible probable pecuniary loss thereby occasioned;" but in my opinion this reasonable expectation must have something to warrant it in the facts of the case. In Dalton v. South-Eastern etc. R. Co., the son had been in the habit of making presents to his parents, amounting in the whole to about £20 a year; the reasonable expectation was that these presents would have continued if the son had not been killed. In the case of Condon v. Great Southern R. Co., *supra*, which goes as far as it is desirable that the cases on this subject should go, the late Chief Baron Pigot said there was evidence that the deceased had been in the habit of rendering services in aid of his parent, and there was evidence of the pecuniary value of the services which he was capable of performing, and the wages he was competent to earn. If a son has been of any pecuniary benefit to his father, even though he is of no actual benefit at the moment he is killed, grounds must exist from which an inference may be drawn. This was held in Duckworth v. Johnston, 4 H. & N. 653. If nothing of the kind is to be found in a case the jury are only left to guess, and are asked to draw a conclusion without being afforded any premises. We have been pressed as to what we would do if a boy were killed a month before he was to come into possession of a large estate. If his parents were poor, it would be difficult to say that there would not be a probability of pecuniary benefit to them if this boy had lived. When that case arises we shall decide it; and I do not think I should have any difficulty in coming to a just conclusion, keeping myself within what I deem to be the rule applicable to a case of the kind. I think it is the duty of this court to take care that actions under Lord Campbell's Act do not become like actions of seduction, in which, on the question of loss of service, fiction has taken the place of fact.

FITZGERALD, B., concurred.

NOTE.—Whether or not the preamble of Lord Campbell's Act, (9 and 10 Vic. c. 93,) was correct, in reciting that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person," is hardly worth investigating, so far as regards practical consequences, though the question does still crop up occasionally, the latest case on the subject being Rusk v. The Charles Morgan, reported in the *Pacific Coast Law Journal* for October 18, 1879. Certainly, the custom of giving compensation for the death of a freeman prevailed among the Anglo-Saxons, and the old remedy of an appeal of death, though its precise effect is somewhat obscure, was probably equivalent to the modern process; but with those antiquarian questions we have here nothing to do, and we shall also freely relinquish in favor of anyone else whom it may concern the task of ascertaining whether or not Mr. Patterson, for instance, in his "Commentaries on the Liberty of the Subject," has correctly interpreted the Welsh Codes of the 10th and 12th centuries, with respect to awarding compensation for the death of a married gentleman who has been killed by negligence; while we shall even content ourselves with simply querying the same ingenious writer's intimation that to St. Patrick was due the introduction, or revival, of eric-fines. Neither shall we inquire into the laws and customs relating to compensation for death caused by a wrongful act among the Germanic nations, the Romans, in Holland, in the Netherlands, etc.; and, though with more reluctance, we shall say nothing about the French code. But, we may observe that it was the Scotch action for *assythement* or *solatium* which directly suggested Lord Campbell's Act—an enactment which has itself been copied by many of the American States, while nearly every State in the Union has, in one form or another, given a right of action for damages sustained by reason of the death of a human being, caused by the wrongful act of another. Lord Campbell's enactment, however, differed in its effect from the Scotch law, in basing the measure of damages merely upon a calculation of pecuniary loss; and the statutes of most of the American States do not differ from the English act in this respect—the Virginia Statute being an exception, as held in Mathews v. Warner, 1 Virg. L. J. 741, while in Kentucky, Iowa, Missouri, Connecticut and California, also, the jury are allowed in such cases to award punitive and exemplary damages. Whether or not our law is quite what it should be in this respect, is at least open to dispute; for though, on the one hand, it might be urged, as it was in Mathews v. Warner, that it would result in great injustice, if juries were to be turned loose to assess damages according to their own notions as to compensation for the mental sufferings and agony of a mother losing her child, or of a wife losing her husband, unrestrained by statutory enactment confining them to the actual pecuniary injury resulting from death, it may well be allowed on the other hand, that the present law fails to provide a remedy in many cases of hardship, such as *Burke v. Cork, &c. R. Co.*, reported above.

The leading case, holding that damages are to be assessed under Lord Campbell's Act merely as compensation for the pecuniary and actual injury sustained, and not as a *solatium*, is Blake v. Midland R. Co. 18 Q. B. 93, 21 L. J. Q. B. 233, which has been frequently followed not only in England and Ireland but in the United States; see Field on Damages, sec. 630; 5 Southern L. Rev. 326. But while no compensation can be given for wounded feelings, or the loss of comfort and companionship of a relative, the damages are not confined to an immediate loss of money to those for whose benefit the action is brought. If no pecuniary damage is proved, no doubt the defendants are entitled to the verdict; Duckworth v. Johnson, 4 H.

& N. 653, 29 L. J. Ex. 25; Boulter v. Webster, 11 L. T. N. S. 598. But the "pecuniary loss" to be compensated for means "some substantial detriment in a worldly point of view." So, the loss of the reasonably anticipated benefit of education and support is sufficient; Pym v. Great Northern R. Co. 2 F. & F. 619, 2 B. & S. 759; 4 Id. 396, 31 L. J. Q. B. 249, 32 Id. 377; see Illinois, etc. R. Co, v. Weldon, 52 Ill. 290. So, the injury to a widow for the loss of her husband's care, protection and support may be considered: Atchison v. Twine, 9 Kas. 350; and the death of a poor man's wife is presumably the cause of pecuniary loss; Chant v. South Eastern R. Co. W. N. 1866, p. 134. And in an American case, for damages for the death of a boy seven or eight years of age, it was held that, if the family was poor, the fact that the boy would probably have early begun to assist in supporting them might be taken into consideration; Barley v. Chicago, &c. R. Co. 4 Biss. 430; but it has been held that a master can not bring an action for the negligent killing of his son who was merely his servant, for the benefit lost must arise through relationship and not through contract, and if no loss was due to the former as such, none due to the latter could be taken into account; Sykes v. Northeastern R. Co. 44 L. J. C. P. 191; and it is admissible for a defendant to show that a plaintiff was not entitled to the services of his minor child, whose death is in question; Quincy Coal Co. v. Hood, 77 Ill. 68. But again, "legal liability alone is not the test of injury, in respect of which damages may be recovered under this statute; but the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a jury, and damages given in respect of that expectation, if it be disappointed, and the probable pecuniary loss thereby occasioned;" Dalton v. South Eastern R. Co. 37 L. J. C. P. 227, 4 C. B. N. S. 296, 4 Jur. 711; Franklin v. South Eastern R. Co. 3 H. & N. 211, 4 Jur. 565; Pym v. Great Northern R. Co., *supra;* Condon v. Great Southern &c. R. Co. 16 Ir. C. L. R. 415, 10 Ir. Jur. N. S. 194; and in America: Railroad Co. v. Barron, 5 Wall. 90; Keller v. New York &c. R. Co. 27 How. Pr. 102; Paulmier v. Erie R. Co. 34 N. J. 151; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; Oldfield v. New York &c. R. Co. 14 N. Y. 310; M'Intyre v. New York &c. R. Co. 37 N. Y. 287; Grotenkemper v. Harris, 25 Ohio St. 510. "Yet," observes a writer in the *Southern Law Review* (Sept. 1879), "it has been held that, in most instances, there must be evidence of pecuniary loss on the part of the survivor for whose benefit suit is brought; Chicago &c. R. Co. v. Morris, 26 Ill. 400, 403. See Dickens v. New York etc. R. Co. 1 Abb. Dec. 504. Such pecuniary damage will be presumed in the case of an action for the benefit of a widow and children; Dunhene v. Ohio Life etc. Co. 1 Disney, 257. Also in the case of a suit for the death of a child, for the benefit of parents; Chicago v. Scholten, 75 Ill. 468; Condon v. Great Southern R. Co. 16 Ir. C. L. R. 415. And see Baltimore etc. R. Co. v. Kelly, 24 Md. 271. But see Bell v. Wooten, 53 Ga. 684; and Allen v. Atlanta Street R. Co., 54 Ga. 503; Ihl v. Forty-second Street etc. R. Co. 47 N. Y. 317. And in the case of the death of a child, his parents are entitled to damages for the loss of his services until he would have come of age; Rockford etc. R. Co. v. Delany, 82 Ill. 198; M'Govern v. New York etc. R. Co. 67 N. Y. 417. And in some cases, for damages for services he would have rendered after that time; Potter v. Chicago etc. R. Co. 21 Wis. 372, *s. c.* 22 Wis. 615. See Seaman v. Farmers' Loan etc. Co. 15 Wis. 578, where it was asked that the jury be instructed to consider, in mitigation of damages, the probability of the marriage, at the age of eighteen, of a young lady whose death was the cause of action." In Bramwell v. Lees, 29 L. T. (O. S.) 82, 111, 166, a father claimed damages, under the act, for the death of his son, twelve years of age; this boy had been living at home, earning nothing, and being pecuniarily a burden to his parents; but it was said that in a year or so he might have gone to work in a neighboring factory, and have taken back money to his parents. The plaintiff recovered damages, and the defendant failed to upset the verdict on the contention that no damage had been sustained within the meaning of the statute.

It is not always mere pecuniary interest that constitutes the exclusive motive of action in suits under Lord Campbell's act, although damages are to be awarded for mere pecuniary injuries. The defendant by his wrongful act, neglect or default, has inflicted an injury which no pecuniary compensation could really retrieve; and the plaintiff claims that justice, at least, should be satisfied. But the law does not recognize the validity of this appeal, so as to admit of punitive or exemplary damages. It regards the actual injury to the plaintiff's material interests alone, and if there be no such injury will not allow even nominal damages. Boulter v. Webster, 11 L. T. N. S. 598; Duckworth v. Johnson, 4 H. & N. 453, 29 L. J. Ex. 25; *contra*, in America, Quin v. Moore, 15 N. Y. 432; Ihl v. Forty-second Street, etc. R. Co., 47 Id. 317; Lehman v. Brooklyn, 29 Barb. 234; Chicago, etc. R. Co. v. Shannon, 43 Ill. 338; Chicago, etc. R. Co. v. Sweet, 45 Id. 197; Chicago v. Sholten, 75 Id. 468. The consequence is that Lord Campbell's Act has by no means completely put an end to the anomaly that, if a person had been only injured to a slight degree, the wrongdoer was liable in heavy damages, whereas if the injury had been so great as to be fatal, the wrongdoer wholly escaped liability.

By allowing reasonable expectations of pecuniary advantages to be taken into account, however, many cases are brought within the law that otherwise would have been without remedy; and this sound and salutary interpretation of the statutory requirements has received the more effect from its having been considered to be a question for the jury, whether the plaintiff had such a reasonable expectation. See *per* Crowder, J., Dalton v. Southeastern R. Co., 4 C. B. N. S. 296; Franklin v. Southeastern R. Co., 3 H. & N. 211; Condon v. Great Southern, etc. R. Co., 16 Ir. C. L. R. 415, 10 Ir. Jur. N. S. 194. Of course, in this as in other cases the jury must have some grounds for reaching the conclusion in the affirmative; or in other words, they ought not to make a mere guess in the matter; but considering the nature of the various circumstances that may be submitted in evidence as leading to such a conclusion, while failing to maintain it with positive assurance, it appears to us that the decision of twelve practical men on this question of fact ought rarely indeed to be overruled. Take the case of a widow suing in respect of the death of her child: on how many circumstances may the inference of "reasonable expectation" validly depend, which a jury might regard in one way and the court in another, both court and jury speculating from them more or less as to future probabilities. How difficult, for instance, to prove the disposition of the child; and yet, that was judged of and taken into account in Condon v. Great Southern, etc. R. Co., *supra*. Again, what positive assurance can be derived from the circumstance that the parent may or may not have been poor at the time of the child's death? In America, indeed, it has been held that it would be improper to admit evidence of the poverty of the widow, the plaintiff (or the next of kin), or of the fact that she was deformed and disabled, for that such facts would not increase or diminish the pecuniary loss sustained. Illinois, etc. R. Co.

v. Baches, 55 Ill. 379; yet in Barlee v. Chicago, etc., R. Co., and Chant v. Southeastern R. Co., referred to above, the plaintiffs' poverty was taken into consideration on the question under discussion. The most recent case on that subject is Chicago, etc. R. Co. v. Bayfield, 37 Mich. 205,, 7 Cent. L. J. 421, where Cooley, C. J., delivering the judgment of the Supreme Court of Michigan, said: "The damage recoverable in a case of this nature are by the statute to be assessed with reference 'to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person;' Comp, L. § 2351. They have no regard to the needs of the persons designated, or to any moral obligation which may have rested upon the deceased to supply their wants. What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his life-time; and to show that the family were poor has no tendency toward showing that this was or was likely to be large or small. There are, it is true, some cases in which perhaps, such evidence must be received, because it tends to establish a moral obligation to demand assistance in the future from one at the time incapable of giving it; as where the person killed was a mere young child, and at present contributing nothing in aid of any one: Ewen v. Chicago R. Co., 38 Wis. 613; Barley v. Railroad Co., 4 Biss. 430; Chicago v. Powers. 42 Ill. 169. But it is a sort of evidence that when necessarily received should be used with caution." See, also, Potter v. Chicago, etc. R. Co., 21 Wis. 372; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Belknap v. Boston, etc. R. Co., 49 N. H. 358; Hunt v. Chicago, etc. R. Co. 26 Iowa, 363; Guengerech v. Smith, 34 Id. 348; Karney v. Pailsey, 13 Id. 89. And the plaintiff's poverty certainly seems to have been considered also in Condon v. Great Southern, etc. R. Co., as well as the circumstances there that the plaintiff had lost her husband by the same casualty. Suppose on the other hand that the plaintiff is wealthy; is it necessarily to be inferred that his child would not have rendered him services of pecuniary value, or that the plaintiff would not be disposed to allow himself to become a beneficiary thereby? What if it is shown that wealthy as he is he had hitherto been availing himself of such services, while by bringing the action itself, showing that he was not above looking forward to further benefit of the kind, and estimating them from a pecuniary point of view? "We do not say that it was necessary that actual benefit should have been derived," observes Pollock, C. B., in Franklin v. Southeastern R. Co., 3 H. & N. 215; "a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him'.' Why, the very fact that a parent, engaged in mercantile or professional pursuits, happens to be in opulent circumstances, may render it the more probable that such assistance as his children can render will be given by them and received by him as a benefit flowing from the exercise of the recognized duties of relationship, and not from contract, which, as we have seen, could not be taken into account. We have thought, too, that it might possibly be a moral duty for a child, not being of age, to assist his parent, who, however opulent, has still to acquire his means by the sweat of his brow, and who might for instance have done for his child much beyond what should naturally have been expected from him, and entitling him to additional gratitude accordingly; but, at all events, would not the question as to the existence of a moral duty in such cases be one for the jury? And we can not but think that however opulent the parent might be, the decision would be hard and anomalous that would hold in such a case that, because of that opulence, a verdict should be "directed" for the wrongdoer; and so, in effect, that, if by the wrongful act, neglect or default of railway companies or others, the children of the wealthy returning home from school for the ensuing Christmas vacation were massacred *en masse*, there would be no redress, while if only somewhat mutilated heavy damages would have been recoverable.

But then it will be said that it is not enough to establish a reasonable expectation of future profit—it should be proved that the parent had been deriving some present profit through the child. "We do not say that it was necessary that actual benefit should have been derived—a reasonable expectation is enough," observes Pollock, C. B., in Franklin v. Southeastern R. Co. And Bramwell v. Lees, referred to above (and mentioned during the arguments in Dillon v. Southeastern R. Co., *supra*), may be remembered as a strong case to the same effect. In Franklin's case it appeared that the son merely assisted his father in some work for which the father was paid 3s. 6d. a week; and in Bramwell's case, the son, twelve years of age, had been living at home, earning nothing, and being pecuniarily a burden to his parents; yet, in both cases damages were held recoverable in respect of the loss of future advantages, reasonably expected. Take, again, the case of Condon v. Great Southern, etc. R. Co., *supra*. There the action was brought by a widow for the death of her son, aged fourteen, Her husband, a herd, had been killed by the same accident, for which she had recovered £400 in another action. The boy was being sent to school, but when at home used to work on the farm in his father's absence. He never earned any wages, but his capabilities were valued at sixpence a day. It was held that the probability (increased by the past filial conduct of the deceased, and enhanced by reason of the father's death) that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, was evidence to go to the jury upon the question of damages, and that a verdict could not have been directed for the defendants. There, when it was argued that there should have been something actually earned by the deceased, Pigot, C. B., observed, "a servant should be procured to supply the place of the child who was killed." And in delivering judgment, after stating that "there was evidence of the pecuniary value of the services which he (the deceased) was capable of performing, and the wages which he was competent to earn;" that learned judge expressly stated that it was for the jury to consider whether there was or was not a fair and reasonable probability that the deceased would have continued to fulfil his filial duties; adding that "it would be to shut our eyes to what is daily passing around us among the population of this country, to ignore the fidelity with which those duties of imperfect obligation are often discharged by children towards their parents even where a long lapse of time has intervened since they parted, and although during the interval they have been separated by vast distances from each other—living, in fact, in many instances, in different quarters of the globe." However, it may be suggested that there the widow was poor—though she had just obtained £400 in another action; and that in Bramwell's and Franklin's cases, also, the plaintiffs were poor. But what constitutes poverty or opulence in connection with this question we should have thought is just one of the matters which it would be properly for the jury to consider; and while the poverty of a plaintiff might be held, as in Chant v. South Eastern R. Co. to give rise to a presumption of pecuniary loss, it seems to us that, on the other hand, the power should not be withdrawn from a jury of hold-

ing (with Pollock, C. B.) that a reasonable expectation of benefit "might well exist though, from the father not being in need, the son had never done anything for him." However, what we have here referred to Condon's case for more particularly is as regards the question of present profit derived by the parent. The boy never earned any wages, and was being sent to school, but when at home used to work on the farm in his father's absence. Pecuniarily he was but a burden to his parent's; yet it was held that a verdict could not have been directed for the defendants.

Of course, it is beyond dispute that there must have been some actual loss, in order to sustain an action under Lord Campbell's Act. The difficulty lies in the application of the rule, nor are the text-writers invariably accurate in expounding it. Thus, Mr. Underhill ("Summary of the Law of Torts," 2nd. Ed. 146) will have it that expenses incurred in medical treatment would sustain the action; whereas, we find that the contrary was expressly held in Boulter v. Welster, 11 L. T. N. S. 598. And cases, indeed, might well arise in which it would be extremely hard to foresee what opinion should be arrived at. If, for instance, the person claiming damages was put, by the death in question, into the possession of a large estate, and there was nothing more in the case, there would be no loss within the statute (see *per* Bramwell, B., Bradburn v. Great Western R. Co. L. R. 10 Ex. 1; Pym v. Great Northern R. Co. 2 B. & S. 759, 4 Id. 396); but suppose that a boy were killed a month before he was to come into possession of a large estate—would the parents be taken to have sustained a pecuniary loss in respect of such estate? "If his parents were poor, it would be difficult to say that there would not be a probability of pecuniary benefit to them if this boy had lived," observed Dowse, B., in the above case of *Burke v. Cork &c. R. Co.*; but what if they were the reverse of poor, and in no way dependent on him for the means of support? "I think it is the duty of this court," observed the same learned judge, "to take care that actions under Lord Campbell's Act do not become like actions of seduction, in which, on the question of loss of service, fiction has taken the place of fact." But, while that there is no legal analogy between those actions in this respect was expressly held in Condon v. Great Southern etc. R. Co., we have seen that there the present loss (*viz.*, of services rendered), apart from the consideration of expectant benefits, was hardly more than nominal. Even supposing, too, that Bramwell v. Lees was the case which we find referred to by Crompton, J., in Pym v. Great Northern R. Co. 2 B. & S. 759, and that the girl had "earned money at a factory," all the probabilities, judging from the report in 29 L. T., confirmed by the statement of Aspinall, *amicus curiæ*, in Dalton v. South Eastern R. Co., and rather strengthened than otherwise by the observations of Crompton, J., *supra*, are that in Bramwell v. Lees, also, the present loss in respect of such earnings was quite insubstantial, the gist and gravamen of the damage consisting of the loss of expected benefits. Nor do we know any reported case where, when there was evidence of substantial loss in respect of expected benefits, coupled with some present loss however trifling, the court has narrowly scrutinized the present loss with a view to computing whether, for instance, putting the cost of maintenance against the value of the services rendered, there would have been a balance of profit, or actual benefit, in favor of the plaintiff. On the contrary, Duckworth v. Johnson (4 H. & N. 653, more fully reported in 29 L. J. Ex. 25) seems to us to be a strong case the other way, while holding that the action would not lie for nominal damages only; and it, at all events, shows that a question of this sort is one most properly for the jury—the court seeming to have struggled to maintain their finding by assuming that they had taken expectant benefits into consideration, although there is little, if anything, in the facts of the case to give rise for the application of the doctrine as to expectant benefits, for which, nevertheless, that case is now an authority (*per* Crompton, J., Pym v. Great Northern R. Co., *supra*), and as to which it is, also, for the jury "to say, under all the circumstances, and taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money," *per* Cockburn, C. J., Ibid. In Duckworth v. Johnson, the plaintiff was a working mason whose son, fourteen years of age, had for two years and a-half before his death been earning 4s. a week, which he had been in the habit of giving to his mother, with whom he had been living. At the time of his death he was not in any employment, and was living with both of his parents. No evidence was given as to what was the cost of his maintenance, or as to whether it was more or less than the amount of his earnings; and it was argued therefore that, from anything that appeared, he might always have been a burden to his parents. Bramwell, B., observed during the argument: "The difficulty I feel is in determining upon what evidence a jury is to act. Suppose a boy is lost in going over to Ireland, where, living with his father, he could earn 1s. a week, are the jury to estimate the damages in reference to the proportion such earnings would bear to the cost of maintenance in their own neighborhood, or in Ireland, and are they to arrive at a conclusion from an opinion previously formed in their mind, or is evidence of the proportion to be given?" But, as the specific objection that there was no evidence as to comparative cost had not been taken at the trial, he did not decide this question. Pollock, C. B., said: "It is true that no distinct evidence was given of the value of the boy's services, and the cost of boarding and clothing him; but as to that the jury were better able to judge than we are. Probably they thought that there would be some balance every week in favor of the father, the value of which might amount to £20. It having been decided that a reasonable prospect of pecuniary benefit may be taken into consideration, it is impossible for us to say that the jury were not warranted in finding the verdict which they have done;" and the verdict, for £20 damages, was upheld accordingly, notwithstanding that there was no evidence as to whether or not the maintenance of the deceased had cost more than the amount of his earnings.

Now, in the case of *Burke v. Cork, etc. R. Co*, reported above, the facts were as follows: The plaintiff, as father of B, brought the action against the defendants under Lord Campbell's Act, claiming damages for the death of his son, from injuries received while a passenger on the defendants' railway. It was proved at the trial that B, at the date of his death, was aged fourteen years and two months, and had been for about three years attending school, where he was especially trained for mercantile pursuits, and where it was expected he would have remained for a couple of years more; but during his three vacations (one month, one week, and three weeks), his father used to send him to his second shop to look after the shop-assistants, and to assist the plaintiff generally in his business, which was that of a spirit grocer and general merchant, and the plaintiff being also manager of a post and telegraph office, B was sometimes employed in riding out with telegrams; and the plaintiff, also, stated that he him-

self was frequently absent from home, and that his son, who was very good and dutiful, was useful at plaintiff's farm. However, he was not in receipt of any wages, but he was intended for the mercantile business of the plaintiff, and, though then too young, he would have been fit to be put in the shop had he lived till seventeen, at which age, in the plaintiff's opinion, his services would have been worth £20 a year, which would have increased to £100 at the age of twenty. The plaintiff (aged fifty) admitted that his annual income from his business was about £7,000. At the close of the plaintiff's case, the defendants applied for a direction, on the ground that there was no evidence of pecuniary loss within the meaning of the statute. Fitzgerald, J., declined to withdraw the case from the jury, who found for the plaintiff £150 damages; and his lordship stated that, if there was evidence proper for the consideration of the jury, their verdict was not against the weight of evidence. Upon a motion for a new trial, on the ground of misdirection and of the verdict being against the weight of evidence, the Exchequer Division held that the case should have been withdrawn from the jury; and, on the motion of the defendants, entered judgment for them. Briefly summarized the judgment of Palles, C. B., was as follows:—Damages must be given solely in reference to pecuniary loss which may be evidenced by proof of a reasonable expectation (1) that profit would be made by the continuance of the life, and (2) that some part of that profit would become the proporty (not necessarily as of right) of the claimant. Here the boy "had never contributed one sixpence to the support of the family;" the position of the father was such as to put him far beyond the necessity of resorting, for his support or otherwise, to the earnings of his child; and the case was one in which "there was no moral duty upon the part of the child to contribute any portion of his earnings to the parent or the family." He was not aware of "any case in which a parent recovered damages, when he or she had not been actually benefited by the labor of the child." When benefits have been conferred, the jury may estimate the value of similar benefits which might have continued to be conferred. But here, if the state of things existing at the time of the death was presumed to continue, it would be a continuance of expense to the parent and of the absence of benefit from the child. To presume that the child's course of life and conduct would change, and that when his labor became valuable the profits of it would become the property of the father, would be mere speculation. And on what would it depend? Upon the dispositions of the child—how are they to be proved? The dispositions of the father—how was it to be determined that the father would allow himself to become the beneficiary of his child? The father's circumstances? In the present case these were "such as to rebut the inference that the child would be a source of profit." There were, therefore, no sufficient elements to enable a jury to say "that it is reasonably certain that pecuniary benefit would have resulted to the father from the continuance of the life of the child." Dowse, B., held "that in a case of this description the plaintiff must fail unless he establishes in evidence that there was in existence, at the time of the death of his son, a state of facts in connection with him out of which a pecuniary advantage arose, or had formerly arisen, and was likely to again arise, to the father, and the continuance or renewal of which pecuniary advantage the father might have reasonably expected had his son not been killed. * * * In the case of Condon v. Great Southern R. Co. *supra*, which goes as far as the cases on this subject should go, the late chief baron said there was evidence that the deceased had been in the habit of rendering services in aid of his parent, and there was evidence of the pecuniary value of the services which he was capable of performing, and the wages he was competent to earn. If a son has been of pecuniary benefit to his father, even though he is of no actual benefit at the moment he is killed, grounds must exist from which an inference may be drawn. This was held in Duckworth v. Johnson, *supra*. If nothing of the kind is to be found in a case the jury are only left to guess, without being afforded any premises." and the learned judge (Fitzgerald, B., concurring) agreed with the lord chief baron that there was no evidence proper to be submitted to the jury, and that judgment should be entered for the defendants.

It is needless to say that, in common with the entire profession, we entertain the highest respect for the learned judges of the Exchequer Division, and the profoundest deference to their decisions; but, after a painstaking investigation, and guided by the principles which we have already discussed at much length in this series of papers, and so pointedly as hardly indeed to require more express reference by way of application to this case (which we are the more reluctant now to dilate upon, as it has been brought to our notice that a very similar case, Halleran v. Bagnall, argued before the Common Pleas Division on Monday last, is still *sub judice*), we feel bound to say, that, to the best of our humble opinion, the learned judge who tried it was right in declining to withdraw it from the jury—an opinion which we should not hold the less strongly in point of law because it may be that, as jurors, we might rather agree with the Exchequer Division in their view of the question of fact involved.

ABSTRACTS OF RECENT DECISIONS.

KENTUCKY COURT OF APPEALS.

November, 1879.]

CONSTITUTIONAL LAW—TWICE IN JEOPARDY.—Section 243 of the Criminal Code which provides that "the attorney of the Commonwealth, with permission of the court, may, at any time before the case is finally submitted to the jury, dismiss the indictment as to all or a part of the defendants, and such dismissal shall not bar a future prosecution for the same offense," is unconstitutional so far as it attempts to authorize, after jeopardy attaches, dismissal of an indictment for felony so that it may not operate as a bar to a future prosecution for the same offense. It is, as a matter of course, to be understood that, even after jeopardy has attached, and in cases of necessity, an indictment may be dismissed or a prosecution discontinued without operating as a bar to a future prosecution for the same offense. The case of O'Brian v. Com., 9 Bush, 333, fully discusses the circumstances under which such necessity may arise. Judgment reversed. Opinion by HINES, J.—*Williams v. Com.*

HOMICIDE—INSTRUCTIONS—MALICE—EFFECT OF INDEPENDENT CAUSES CONTRIBUTING TO DEATH.—Under an indictment for murder or manslaughter, where there is evidence from which the jury might find the existence of facts constituting involuntary manslaughter, it becomes the duty of the court to instruct the jury as to the law of this offense. Buckner v. Com., 14 Bush, 601; Brown v. Com., Nov. 15, 1879. For the failure of the court below to so instruct

the judgment should be reversed. 2. The court instructed the jury that "malice is also implied by the law from any deliberate and cruel act committed by one person against another, however suddenly done." *Held*, error. The existence of malice is to be left to the determination of the jury, and it is improper under any circumstances to tell them that the law implies malice from any state of facts. Buckner v. Com., 14 Bush, 601. 3. If the fatal wound was a dangerous one—that is, calculated to endanger and destroy life, and death ensues therefrom, it is sufficient proof of murder or manslaughter; and the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. But if the wound is not dangerous in itself, and death results from improper treatment, or from disease subsequently contracted, not superinduced by or resulting from the wound, the accused is not guilty. 1 Hale's P. C. 428; Parsons v. State, 21 Ala. 301; Com. v. Hackett, 2 Allen, 141; Livingston v. Com., 14 Gratt. 601. Reversed. Opinion by HINES, J.—*Bush v. Com.*

SUPREME COURT OF MINNESOTA.

November-December, 1879.

PATENT—CONSIDERATION FOR NOTE.—The grant of a license to sell a patented article if the patent is void, does not furnish a valid consideration for a promissory note given for the purchase price of the license. If, however, the patent be valid, though it may not be a profitable one, the grant of a license to sell it is a valid consideration for the agreement to pay the purchase price of the license. To impeach a contract as without consideration, on the ground that the article patented is useless, it must be shown that it is useless in the sense that will avoid the patent. Rowe v. Blanchard, 18 Wis. 441; Lester v, Palmer, 4 Allen, 145; Dickinson v. Hall, 14 Pick, 217. Opinion by GILFILLAN, C. J.—*Wilson v. Hentges.*

LIFE INSURANCE—BENEFICIAL INTEREST.—A policy of life insurance assured the life of a husband "for the sole use of M B, his wife, in the sum of $1,000, for the term of ten years from date," and continued: "and the said company doth hereby promise and agree to pay the said sum assured at its office to said person whose life is assured, or assigns, in ten years from the date thereof, viz.: in the year when the said person shall have attained the age of 55 years, or in case of the person's death, if the person whose life is assured, to the said beneficiary or assigns in sixty days after due notice and proof of such death. * * * In case of the death of said beneficiary before the death of the person whose life is assured, the amount of the insurance shall be payable at maturity to the heirs or assigns of the person whose life is assured." The husband did not die within the ten years. *Held*, that the wife can not recover the $1,000; that the policy enured to her only in case the husband died within the term, leaving her surviving. Opinion by GILFILLAN, C. J. —*Tenness v. Northwestern Mut. Life Ins. Co.*

RAILROADS—FENCING TRACKS.—Laws regulating the construction and maintenance by railroad companies of fences and cattle guards along their tracks, is the exercise of the police power of the State. Of the cases that consider such statutes, we think those are decided upon the better reason which hold such statutes to be police regulations designed for the protection of all, and not merely rules for constructing division fences between adjoining owners, for neglect of which only an adjoining owner may complain. Corwin v. N. Y. & E. K. Co. 13 N. Y. 42; Shepard v. Railroad Co. 35 N. Y. 641; Brown v. Railroad Co. 12 Gray, 55; Ind. & Cin. R. Co. v. Townsend, 10 Ind. 38; Spence v. C. & N. etc. R. Co. 25 Iowa, 138; Stewart v. Railroad Co. 32 Iowa, 561. If in any case the legislature may bind the State not to exercise this power, an intention to do so can not be implied, but must appear in express and unmistakable terms. Winona etc. R. Co. v. Waldron, 11 Minn. 515. A clause in a railroad charter providing what fences or other structures required for the protection of life and property the company shall maintain, is not sufficient to conclude the State from any future exercise of the police power. To an action against a railroad company for cattle injured on the track, they having gone upon the track in consequence of its failure to construct fences, it is not a defense that the cattle were trespassers upon the land from which they passed for want of a fence to the track. Opinion by GILFILLAN, C. J.—*Gillam v. Sioux City etc. R. Co.*

LIABILITY OF COMMON CARRIERS OF PASSENGERS.—In an action for an injury to a passenger against a common carrier of passengers, proof that the injury occurred from the breaking, giving away or improper working of the vehicle, or any of the machinery or appliances employed in carrying the passengers, makes a *prima facie* case of negligence on the part of the carrier. In such case the burden is upon the carrier to prove that the injury was not caused by any want of care on his part. Cooley on Torts, 552; Stokes v. Saltonstall, 13 Pet. 181; McLean v. Burbank, 11 Minn. 277; Fay v. Davidson, 13 Id. 523. Contributory negligence of plaintiff is matter of defence, and plaintiff need not prove there was none in making out his defence. Where a passenger is placed by the negligence of the carrier in a situation of great peril, his attempt to escape the danger, even by doing an act also dangerous, and from which injury results, is not contributory negligence such as will prevent a recovery, if the attempt was one which a person acting with proper prudence might, under the same circumstances, make. This is to be determined from the circumstances as they appear to the passengers at the time. Stokes v. Saltonstall, 13 Pet. 181; Buel v. Railroad Co. 31 N. Y. 314; Trombley v. Railroad Co. 61 N. Y. 158. That he was injured in his attempt to escape, and that those who remained in the car were unhurt, might, of course, be considered by the jury in determining the question. Opinion by GILFILLAN, C. J.— *Wilson v. Nothern Pacific R. Co.*

SUPREME COURT OF KANSAS.

November, 1879.

FORCIBLE ENTRY AND DETAINER—ACTUAL POSSESSION.—1. Where a person enters peaceably upon a vacant lot, under a *bona fide* claim of title, with a view of holding possession, and then incloses the lot with a fence composed of posts and barbed wire of such a nature as to inform all persons that the premises are appropriated; *Held*, that such person has actual possession of the premises. 2. If the actual possession of another be taken in his absence, by unlawfully and forcibly removing and destroying with a chisel and a hatchet or hammer a wire fence enclosing the premises, and such possession is continued to be detained against the will and consent of the original possessor,

and a surrender of the premises is refused upon demand; *Held*, an unlawful and forcible entry and detainer within the meaning of sec. 158, art. 13, chap 81, p. 727 of Dassler's Comp. Laws, 1879. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Campbell v. Conradt.*

GUARDIAN'S DEED—STATUTE OF DESCENTS AND DISTRIBUTION—HOMESTEAD—STATUTE OF LIMITATIONS.—1. There is no statute making a guardian's deed presumptive evidence that the directions and requisitions of the law have been observed and complied with in its execution, and therefore the proceeding and power by virtue of which it has been executed must be shown, before the deed can be introduced as evidence of a conveyance of the land therein described. 2. If the homestead, occupied by the widow and family of an intestate after his death, or any interest therein, is sold and conveyed, while the premises are still occupied as a homestead by the widow and any one or more of the minor children, the title to such property or interest passes to the purchaser, but such conveyance will not interfere with the occupation of the premises as a homestead by any of said occupants, not joining in the sale. 3. Where a plaintiff, in an action in the nature of ejectment, alleges in his petition that he has a legal estate in the real property therein described, and is entitled to the possession of all the property, and the proof shows he is a tenant in common of the property and the defendant is a co-tenant, and that the defendant denies the plaintiff's right, plaintiff may recover against his co-tenant any part or portion of the land to which the proof shows him entitled. 4. The rents and profits to be recovered in an action in the nature of ejectment are only those that have accrued within three years before the commencement of the action. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*O'Gatton v. Tolley.*

DISSOLUTION OF CORPORATION — PARTIES — AMENDMENTS.—1. Upon the dissolution of any corporation already created, unless a receiver is appointed by some court of competent authority, the president and directors, or managers of the affairs of the corporation, are the trustees of the creditors and the stockholders of the corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them, and for this purpose, they may maintain or defend any judicial proceeding. Sec. 42, chap. 23, Comp. Laws, 1879. 2. In an action brought under the above section of the statute by the sole manager of a corporation, after its dissolution, to recover the debts and property of the dissolved corporation, the suit must be entitled in the name of such manager of the late corporation, and not in the corporate name of the dissolved corporation. 3. Where an action is commenced by the sole manager of a corporation, in its corporate name, after its dissolution, to recover certain debts and property of the dissolved corporation; *Held*, not error for the district court to permit an amended petition to be filed, showing the expiration of the life of the corporation, its date of dissolution and the name of its sole manager at the time of such dissolution. 4. Upon the filing of such amended petition, the action must be continued in the name of the manager of the late corporation, to correspond with the allegations of the amended petition. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Paola Town Co. v. Krutz.*

CURRENT TOPICS.

The New York *Graphic* of a recent date, in speaking of theatrical criticism, calls upon theatre-goers to exercise more frequently a right which though effectively used in England and on the Continent, seems to have fallen into disuse in this country—the right of the "hiss." "Let us hiss," it says, "if the actor is essentially stupid or the play vulgar and dreary. Why should an audience not express its censure as well as its pleasure? The one is as necessary as the other. American audiences are too long suffering. They tolerate rubbish that no cultivated audiences elsewhere in the world would tolerate. This submission is abused. Managers, 'stars' and playwrights think that they can do as they please with their patrons. Theatre-goers will not strike back. What is the use of general culture if it does not make its influence felt?" Reading these strictures and suggestions, and sympathizing with their spirit, led us to make an excursion into the law reports to assure ourselves whether or not the hiss is a legal right; and we have come to the conclusion that it is. The earliest case in which this right is judicially acknowledged is Clifford v. Brandon, 2 Camp. 358. In this case the plaintiff, an eminent lawyer of his day, sued the defendant, a theatre manager, for false imprisonment. The difficulty grew out of the famous O. P. riots—for a fuller description of which the reader is referred to Mackey's Popular Delusions—and where the action of the managers of the London theatres in raising their prices, caused riots for several nights at all the places of amusement in the city. On the night in question, when the excitement was at its height, the plaintiff went to the Covent Garden Theatre, and having taken part in the disturbance, which took the form of blowing horns, ringing bells and exhibiting placards demanding a restoration of the old prices, on the part of the audience, was arrested by the box-keeper. On the trial of the action for the trespass and false imprisonment, *Best*, Serjt., for the plaintiff, argued: "Within the walls of a public theatre the public have a right to express their approbation or disapprobation without limit or control. This is a right which has been immemorably exercised, which is essential to the prosperity of the drama, and which was never before questioned in a court of justice. It stands on the same principle with liberty of criticism, which the judges have often declared to be sanctioned and protected by law. A piece may be hooted from the stage as it may be censured and ridiculed in writing when it is published. An actor may be praised or condemned in a newspaper or pamphlet for his theatrical performances. So, he may be hissed or applauded at the moment by those who witness his efforts." From this he argued that the conduct of the managers in raising the prices should receive the disapprobation of the public in a like manner. But Lord Mansfield, C. J., who presided at the trial dissented from this position: "Theatres," he said to the jury, "are not absolute necessaries of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go; and the proprietors will be ruined unless they lower their demands. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage. It is said that if the prices asked are considered too high people have a right to express their disapprobation in the tumultuous manner they have adopted. From this doctrine I must altogether dissent." But the chief justice was careful to add that the hissing of a per-

former was another and a different thing. "These premeditated and systematic tumults," he said, "have been compared to that noise which has been at all times witnessed at theatres in the immediate expression of the feelings of the audience upon a new piece, or the merits or defects of a particular performer. The cases, however, are widely different. The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment, and nobody has ever hindered or would ever question the exercise of that right." The jury, however, found that the arrest was illegal, and the plaintiff had a verdict.

Lord Mansfield had remarked in Clifford v. Brandon that a *conspiracy* to hiss an actor would be actionable. Forty years later a case of this kind came up in the Court of Common Pleas. The plaintiff, on appearing on the stage in the character of Hamlet, was obliged to desist owing to the disturbance, hissing and noise, which his appearance caused, and which was led by the defendants, who were sued for conspiring to drive him from the stage. Serjeant Talfourd, himself a dramatic writer, appeared for the defendants, and argued that the private character of the plaintiff was the cause of the effort to drive him from the stage, and that the demonstration was proper. "Some years ago," he said, "it was intended to produce a representation of the murder of Mr. Weare on the stage, and it was announced that Probert, one of the parties implicated in the murder, would appear in the piece. The representation never took place; but if it had would it not have been most proper to hiss such a piece and such an actor off the stage?" But Cresswell, J., answered: "The question would still have been whether you could justify a *conspiracy* for affecting the object." and Maule J., added: "Sympathy is the proper ground for the expression of feeling in a theatre, not conspiracy," and in another part of the case saying: "The hooting, hissing, groaning, and yelling would not, *per se*, afford a ground of action." The chief justice (Tindal) summed up the case to the jury in these words: "The law on this subject lies in a narrow compass. There is no doubt that the public who go to a theatre have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage, and I believe that no persons are more anxious that the public should have that right than the actors themselves, for if it were laid down that persons who exercised their free judgment, would be subject to actions for damages, not only would it be fatal to the actors on the stage, but it would prevent people from frequenting the theatre at all. At the same time parties have no right to go to a theatre by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose; and therefore it is only if you can see by the evidence that has been given that the two defendants had laid a preconcerted plan to deprive the plaintiff of the benefits which he expected to result from his appearance on the stage that you ought to find a verdict against them." Gregory v. Brunswick, 1 C. & K. 23. The jury found for the defendants. We have not been able to find any American adjudication on the subject, though Mr. Bishop in his work on American Criminal Law, states the rule to be substantially as laid down by Bushe, C. J., in the Irish case of Rex v. Forbes, Cr. & Dix. 157, which he cites: "The rights of an audience at a theatre are perfectly well defined. They may cry down a play or other performance which they dislike, or they may hoot or hiss the actors who depend upon their approbation or their caprice. Even that privilege, however, is confined within its limits. They must not break the peace or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment; for if it is premeditated by a number of persons confederated beforehand to cry down even a performance or an actor, it becomes criminal. Such are the limits of the privilege of an audience even as to actors and authors."

Mr. Gladstone, the English statesman, in his now celebrated tour through Scotland just completed, found time to deliver the annual rectorial address to the students of Glasgow University, in which he had the following to say concerning the profession of the law: "Many of you are preparing with defined intentions for one or other of the three of the great professions best known to our fathers—I mean medicine, the law, and the ministry of religion. Others have other views already fixed, or have not yet fixed their views, but let me say a few words on the medical and legal professions. They are not likely to be displaced or menaced by any of the mutations of this or a future century; the demand for their services lies deep, if not in the order of nature, yet in the actual constitution of things, as the one is founded upon disease and the other on dissension—nay, the demand is likely to be a growing demand. With material and economic progress the relations of property become more complex and diversified, and as the pressure and unrest of life increase with accelerated movement of mind and body, the nervous system which connects them acquires greater intensity and new susceptibilities of disorder; and intensity, disorder and suffering, giving occasion for new problems and new methods of treatment, are continually developed. As the god Terminus was an early symbol of the first form of property, so the word Law is the venerable emblem of the union of mankind in society. Its personal agents are hardly less important to the general welfare than its prescriptions, for neither statute, nor parliament, nor press is more essential to liberty than an absolutely free spoken bar. Considered as a mental training, the profession of the bar is probably, in its kind, the most perfect and thorough of all professions. For this very reason, perhaps, it has something like an intellectual mannerism of its own, and admits of being tempered with advantage by other pursuits lying beyond its own precinct, as well as by large intercourse with the world—by studies not only such as those of art and poetry, which have beauty for their objects, but such as history, which opens the whole field of human motive as well as an art, which is not tied in the same degree to position and immediate issues, and which, introducing wider laws of evidence, gives far more scope for suspense of judgment, or, in other words, more exact conformity or more close approximation between the mind and the truth which is in all things its proper object. We all appreciate that atmosphere of freedom which, within the legal precinct, is constantly diffused by healthy competition. The non-legal world, indeed, is sometimes sceptical as to limitations which prevail within the profession itself. It is sometimes inclined to think that of all professions its action is in these modern times most shrouded in a technicality and a mystery which seriously encumbers the transaction of affairs, and in some cases tend to exclude especially the less wealthy classes from the benefits which it is the glory of law to secure for

civilized man in the easy establishment and full security of rights. But these are questions which in more tranquil times will find their own adjustment, and while I have hinted to youths intending to follow this noble profession the expediency of tempering it with collateral studies, I congratulate them on the solidity of the position they are to hold. No change, practical or speculative, social or political, or economic, has any terrors for the profession of the law."

RECENT LEGAL LITERATURE.

SHIRLEY'S DARTMOUTH COLLEGE CAUSES.

Many readers first made acquaintance with this work in the pages of the *Southern Law Review*, where it attracted unusual attention, and created a general desire that it might be preserved in a separate and compact form—a wish that now has its fulfilment. Lawyers and students of history will find here something of interest and permanent value. No celebrated case in this country can compete with that here discussed, whether for the importance of the questions involved, or for the ability and learning displayed in its preparation and decision, or for the far-reaching consequences of the principle adjudicated. The trial of the seven bishops in London stimulated resistance to arbitrary power and led the way to revolution; but the principle which it consecrated, if it settled anything, could only be of rare application. It might be said with truth that it settled nothing except the fact that in a free country there is a natural limit to the subserviency of juries. This was simply an empirical result. In the Dartmouth College Case a great rule of Constitutional right was established which every day becomes of wider application. If in the one case Lord Somers made the reputation of being the first lawyer of England by a speech of fifteen minutes in duration, in the other the greatest legal luminaries of a time of great lawyers and great judges, vindicated their natural and acquired supremacy by an unusual display of ability.

Nowhere, we think, have we so full and accurate an account of any great civil cause as that which is to be found in this volume. By the aid of the author's studies, pursued under auspices which few could have possessed, we have the benefit of a strong light thrown on all the motives and characters of the different actors in the judicial drama; we perceive the small sources of personal feeling and jealousy from which the litigation took its origin; the utter novelty of a question now no longer novel; we behold Webster rising with eyes unfathomable with gloom and mystery to speak for the last time for his *alma mater*, whom he has followed thus far in order that if she fell she may at least "fall in her robes." The portraiture of the chief personages is admirably given; perhaps Macauley or Tacitus could hardly have done better. It can not be denied that the author is unusually happy in the delineation of character. Each picture is a perfect gem in its kind; but the setting shows the marks of of haste, of a mind that is full of its subject, communicating itself without labor and without due regard to orderly arrangement and the necessity of a uniform polish. By this laxity the interest of the book is not much diminished, but its effectiveness is seriously impaired. We have an impression that the author is capable of work of a high order, but that he has only scant command of time.

e Dartmouth College Causes and the Supreme Court of the United States. By John M. Shirley, St. Louis; G. I. Jones & Co., 1879.

The photographs of character to which we have referred are evidently based on a thorough study of the lives of the men thus brought before us; but in one case we must be allowed to express a more than provisional dissent. The author does the most ample justice to the great natural genius of Marshall, but he thinks that he was deficient in learning; believing that Mr. Justice Washington was his superior in this latter quality. We are aware that it is a common thing to aggrandize the genius of the great chief justice at the expense of his learning. But we do not believe that any man was ever a great jurist without the most laborious study. Because Marshall attended the yearly meetings of the cricket club, there is a vulgar belief that he spent his time when off the bench mostly in playing his favorite game; because it is mentioned that he one day played marbles when chief justice with a little boy, the vulgar opinion has grown up that he played with every boy that he could catch. This is history; the same history that will have it that the most of the words used by Thurlow were mere oaths; that Washington always looked as if he were sitting for his picture, and that General Jackson never took his pipe out of his mouth but to utter his favorite, "By the Eternal." But Mr. Shirley ought to know that to follow history is usually to follow a lie. One game of cricket and one game of marbles will be more dwelt upon than years of study. The learning of Mr. Justice Washington is particularly prominent because in his case there was little or nothing to distract the attention from it. With Marshall it was different; with him his learning, great as it was, was indeed the least part of the man. With him learning was not a thing separate from himself, to be referred to as to dry plants in an herbarium. If we did not know otherwise from the whole tenor of his life, we should almost be forced to the conclusion that there was some affectation in his almost ostentatious simplicity. But on closer inspection we find that there is the amplest evidence of profound learning in most that he said or wrote. He does not indeed turn down the page of any particular book, but we find such a coincidence between his conclusions and those of the greatest jurists that had preceded him, as could only be miraculous if it had not proceeded from patient investigation. Where he differs from his predecessors, his line of thought shows that he has considered what has been said on the other side, and that he knows what to avoid and what to adduce. The supposed want of learning of the greatest jurist that America has to boast should, we think, be dismissed as an idle tale that has done service long enough. That he had great aptitude for the law is most obvious; but he no more knew law by intution than he could know geology by intuition. In the American Leading Cases, in a note by Mr. Wallace to the decision of Chief Justice Marshall, in Field v. Holland, this expression is used, somewhat feliciously it must be admitted, though perhaps with unnecessary severity: "Mr. Justice Cowen, in Pattison v. Hull, 9 Cow. 771, had satisfied himself that he had consigned to insignificance this conclusive authority by observing that in this case the books do not appear to have been consulted. It should be remembered, however, that there are some judges who consult more books than they quote, as there are others who quote more books than they understand." The fable as to the want of labor on the part of Judge Marshall has done vastly more harm than it is ever likely to do good. The truth is that there is no road to distinction in our profession without unremitting toil; and this truth has a still larger application. Of course, there is a common belief that poets throw off their productions by mere inspiration, over which they have no control. Lord B

ron is commonly thought to be a conspicuous example of this facility. Most of his time, it is thought, was spent in dissipation. Another poet who certainly "laborED" sufficiently, has described him as "taking his way" through all kinds of science without the smallest attention or trouble on his part; but Byron left behind him a mass of writings going to show that he must have been one of the busiest men of his time. The truth is, we conclude, that such notions are only fit for the vulgar to whom they are generally addressed. We must repeat, however, that with this single exception, we do not think that the estimates of the author of the book before us of the principal characters in the conflict which resulted in the Dartmouth College Cases, are open to reasonable criticism.

Mr. Shirley is of the opinion that the principle of construction was somewhat strained in the case in question, and that the court that decided it is now engaged in that process of backing down which is not wholly unfamiliar in judicial writings. In this we strive in vain to agree with him. We know that of late there are not a few who maintain that the opinion of the court was a mistake. We do not think so. It has had a good effect in giving stability to many important rights which otherwise would have been an easy prey to the vacillation of popular opinion and to the schemes of mercenary politicians. Any other doctrine would have thwarted great enterprises by introducing elements of hazard and uncertainty which, under present rules, are unknown. As to the reasoning on which the decision is placed, we have never seen anything that could fairly be adduced as a satisfactory reply to the logic of Chief Justice Marshall, on a point which he was peculiarly fitted to decide, and in the decision of which he had every advantage that could be bestowed by the learning and talent of the bar in its best estate.

NOTES.

——John Humphreys Parry, the eminent serjeant-at-law, and one of the leaders of the English bar, died on the 19th inst., of congestion of the lungs, aged sixty-five.——The following remarkable title appeared in an answer filed in a New York court last week: Wellington Porter against Daniel Quill, Arsinio Amabile, Raphael Suckrat, Jim Libbick, Louis Somebody, Martin Jinks, Lonigo Louis, Joseph Amen, Tony Amen, Billy Lonias, Bechance Godjohn, Junice Curio, Jim Liberto and others. It was a mechanic's lien suit, most of the defendants being Italian laborers, and it is supposed that the extraordinary production above set forth was the fruit of the prolonged struggle of a modern gang foreman with the dulcet language of the modern Roman.

——We are glad to see that judicial notice has been taken of the fact that cigars are not necessarily "tobacco," for we have been of that opinion ourselves more than once. In an English court last month an excise prosecution was heard against a hawker who was charged with selling tobacco at a fair without a license. A laborer proved buying two cigars, for which he paid 3d., at the defendant's stall. He afterwards, at the request of an officer of Inland Revenue, went and purchased another cigar, which defendant took from a box on his stall. For the defence, his counsel said that the defendant was a cripple almost penniless, and it was strange that the excise should lay a trap to catch him as they had done; but after the explanation he should offer, he thought the bench would have no hesitation in dismissing the case. The defendant was charged with selling tobacco without having a license. Not a word was said about cigars in the act; and he submitted that cigars might and did consist chiefly of hay and cabbage leaves, and that, in fact, they were not "tobacco" at all. The prosecuting counsel replied; but the bench agreed with the defendants' counsel, and dismissed the case.

——Senator Davis, of Illinois, has introduced a bill into the United States Senate to establish a Federal Court of Appeal. The bill provides that a Circuit Court shall be held in each judicial district of the United States at the same time and place as the District Court. It also provides that the appellate jurisdiction of the Circuit Courts shall be repealed from and after the first of next September, except in regard to bankruptcy proceedings, and that there shall be established in each of the circuits of the United States a "Court of Appeals," which shall have appellate jurisdiction, subject to the provisions of the bill, of all cases arising in the several Circuit and District Courts within said circuits respectively. This Court of Appeals is to consist of the Supreme Court justice assigned to the circuit, and of the circuit judges thereof, and two of the district judges, to be designated for each term of the court by the senior circuit court judge. Any three of these members of the court, including at least one judge competent to preside, shall constitute a quorum. The decision of the Court of Appeals upon questions of fact shall in most cases be final; but a review upon the law may be had to the United States Supreme Court in certain cases. Other sections of the bill provide that the President shall appoint for each circuit two additional circuit judges, and that the terms of the Court of Appeals shall be held at the cities of Boston, New York, Philadelphia, Richmond, New Orleans, Cincinnati, Chicago, St. Louis and San Francisco, the first term at each place to be held on the first Tuesday of November, 1880.

——A Scotch advocate writes a pleasant letter to a New York journal concerning the peculiarities and traditions of his profession. "I find," he says, "that nothing interests an American so much as my wig. I only wish the person who thus derives amusement from the fashion had to experience its inconvenience. To begin with, they are by no means cheap. A horsehair wig costs about $50, and an ordinary one—they are now all made out of whalebone shavings—abut $30. They very soon get dirty, and to powder them as some men used to do, only makes one's coat perpetually greasy. Then in summer they are hot and tight on the head. Yet we all wear them. We are not compelled to do so. We must wear a gown; that is our mandate. The abolition of the gown I should regret. Its several parts involve not a little curious history. For instance we carry at the back of the gown a little pocket which, though still worn, is now sewn up. That appendage takes you back more than 300 years, to the days before the Reformation, when the advocates were churchmen. No churchman was allowed to accept a regular payment for his services. But if he was prohibited from handling the money, that was no reason why you, if you wanted your case particularly attended to, should not put a couple of gold pieces into the bag which he carried at his back. So you see we still have some relics of the past surviving in this reforming age. Many of our names even strike a stranger as peculiar. The official head of the bar is called 'Dean of the Faculty.' 'Ah,' said Sidney Smith, when he heard the title for the first time, 'that's very odd now. With us in England our deans have no faculties?' Absurd as these old customs and names may be, it can not be denied that the country has reason to be proud of her judicial arrangements, not merely in the Supreme Court, but down to the humblest judicatory."